

Simon DeBartelo Group a/w M.S. Management Associates, Inc. and Local 32B-32J, Service Employees International Union, AFL-CIO. Case 29-CA-19758-1¹

July 22, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN
AND HURTGEN

On February 11, 1997, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel filed an exception and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exception and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue in this case is whether the Respondent is a successor employer to General Growth Management, Inc. (General Growth) and, if so, whether the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the exclusive representative of its air-conditioning and heating service and maintenance (HVAC) employees at the Smith Haven Mall. The judge found that the Respondent was not a successor employer to General Growth and was, therefore, not obligated to bargain with the Union as the representative of its HVAC employees. For the following reasons, we reverse.

Facts

Prior to December 1995, the Smith Haven Mall was owned by Prudential Inc. and was managed by General Growth. General Growth had a collective-bargaining agreement with the Union covering a unit of about 35 housekeeping employees employed as housekeepers, machine operators, and other building maintenance employees. Also included in the unit were four maintenance A mechanics who operated the mall's heating and air-conditioning system. There was no interchange between the HVAC employees and the housekeeping employees.

On December 28, 1995, the Respondent bought the mall from Prudential and terminated General Growth as the cleaning contractor. On the morning of December 28, General Growth held a meeting with all unit employees and informed them of the sale. Then, representatives of the Respondent met with the unit employees and told them that the Respondent was con-

tracting out the housekeeping and maintenance services to an outside cleaning contractor, but that it intended to handle the HVAC work on an in-house basis with its own employees. The Respondent invited the four HVAC employees formerly employed by General Growth, as well as other interested employees, to submit applications. Other outside applicants also applied for the HVAC jobs in response to a newspaper advertisement. Later on December 28, all four of the former General Growth HVAC employees were hired. No other applicants were hired. The four HVAC employees performed the same jobs they formerly performed for General Growth, maintaining and running the mall's heating and air-conditioning system. The judge found "as a fact that the HVAC employees performed essentially the same duties and job functions for Respondent as they did for General."²

On December 27, the Union's counsel, apparently aware of the impending sale, sent a letter to the Respondent making an "unconditional offer for employment" with the Respondent as the successor to General Growth on behalf of the incumbent building service and maintenance employees and requesting the Respondent to contact him "for purposes of arranging for negotiations for terms and conditions of employment to be embodied in a formal collective bargaining agreement." On December 28, the Respondent's counsel replied, stating that because the Respondent had not yet completed its hiring process, it was unable to agree to the Union's request for contract negotiations.

Analysis

In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987), the Supreme Court reiterated its prior approval in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), of the Board's approach to determining whether a new employer is a successor to a prior employing entity required to recognize and bargain with the representative of its unit employees. The Court noted that the approach is primarily factual and is based on the totality of the circumstances presented by each case. The Court instructed that the focus should be upon whether there is "substantial continuity" between the enterprises, and summarized as follows the factors relevant to determining when substantial continuity exists:

[W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

¹The case number appears as amended at the hearing.

²No exceptions have been filed to that finding.

The Court also stated that the Board must analyze these factors primarily from the perspective of the employees, that is, “whether ‘those employees who have been retained will . . . view their job situations as essentially unaltered.’” *Id.*, quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973).

Applying this analysis to the facts presented here, the judge found, and we agree, that the Respondent provides (through a subcontractor) the housekeeping services formerly provided by the predecessor, as well as the HVAC services formerly provided by the predecessor. Thus, despite the fact that the business of the Respondent, as mall owner, is not limited to the provision of housekeeping and HVAC services, we agree with the judge’s finding that the business of both employers is “essentially the same.”³ The services are provided to the same customers (the mall’s stores), and the same equipment is used by the employees to provide the services, although the supervisory staff of the Respondent differs from that of General Growth. There was no hiatus in operations. When the Respondent began operations on December 28, 1995, the HVAC employees it hired had all been bargaining unit employees at General Growth, and it is apparent that from the perspective of the Respondent’s HVAC employees, there was no significant difference in their job situation.

The judge found, however, that, although a unit of the Respondent’s HVAC employees “would constitute an appropriate unit,” the General Counsel had failed to establish a “substantial continuity of the employing enterprise” because of “the small residual size of the appropriate unit left over when compared to the size of the unit represented by the predecessor.” We disagree with the judge and find that the Respondent is a successor to General Growth even though it hired as its own employees only the four employees who performed HVAC services.

It is well established that the bargaining obligations attendant to a finding of successorship are not defeated by the mere fact that only a portion of a former union-represented operation is subject to a sale or transfer to a new owner, so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation.⁴ As set forth in *Mondovi Foods Corp.*, 235 NLRB 1080, 1082 (1978), cited by our dissenting colleague, the Board’s key consideration is “whether it may reasonably be assumed that, as a result of transitional changes, the employees’ desires concerning unionization [have] likely changed.” [Footnote omitted.] Once it has been found that the purchaser has

hired a sufficient number of former employees of the seller to constitute a majority of the purchaser’s employee complement in an appropriate unit, the Board “considers such circumstances as whether or not there has been a long hiatus in resuming operations, a change in product line or market, or a change of location or scale of operations. . . . However, a change in scale of operation must be extreme before it will alter a finding of successorship.” *Id.*⁵ We find that none of the factors discussed in *Mondovi* are present here. There was no hiatus in operations, no change in product line or market, and no change in location. The change in scale of operation that occurred in this case is not, in our view, “extreme.” Thus, there was nothing in the transitional changes that reasonably “would undermine a finding that the employees’ desires concerning union representation have remained unchanged.” *Mondovi*, *supra*.

While the judge recognized that successorship obligations are not defeated simply by the fact that only a portion of a predecessor’s operation have been transferred, he nonetheless found no successorship based on the Board’s holding in *Nova Services*.⁶ Contrary to the judge, we do not agree that *Nova* controls the instant case.

Assuming the continued validity of *Nova*,⁷ we find that case distinguishable.⁸ As our dissenting colleague concedes, the HVAC employees retained by the Re-

⁵ As support for this latter proposition, the Board in *Mondovi* relied on *Ranch-Way, Inc.*, 183 NLRB 1168 (1970), *enfd.* 445 F.2d 625 (10th Cir. 1971), vacated 406 U.S. 940 (1972), on remand 81 LRRM 2736 (10th Cir. 1972), successorship finding reaffirmed in 203 NLRB 911 (1973), “in which respondent was found to be a successor although it had purchased only 1 of the seller’s 16 operations. The seller had a collective-bargaining agreement with the union covering 800 production and maintenance employees; respondent hired 18 of the seller’s previous employees, a majority of the unit complement for the operation which it purchased.” *Mondovi*, 235 NLRB at 1082 fn. 8.

⁶ 213 NLRB 95 (1974). In *Nova*, the predecessor was a statewide cleaning operation which had a contract with Mechanics National Bank. The alleged successor successfully solicited the contract to perform janitorial services, but only for certain of the bank’s facilities. A competing cleaning company took over much of the bank’s janitorial work previously performed by the predecessor. The bank portion of the work that the alleged successor performed was less than half of its workload and required the services of considerably less than half its work force, all of whom performed an identical type of work. Under those circumstances, the Board found that there had not been a substantial continuity in the employing enterprise and that the new employer was not a successor.

⁷ In *Hydrolines, Inc.*, 305 NLRB 416, 423 fn. 43 (1991), the Board distinguished *Nova* stating that its holding “must be limited to the facts of that case.” Similarly, in *Lincoln Park Zoological Society*, 322 NLRB 263 (1996), *enfd.* 116 F.3d 216 (7th Cir. 1997), the Board adopted the administrative law judge’s statement that *Nova* “is of questionable precedential value since it has been limited to its own facts” in *Hydrolines*.

⁸ As noted by the court in *NLRB v. Boston-Needham Industrial Cleaning Co.*, 526 F.2d 74, 77 (1st Cir. 1975), successorship “is a field where intricate line drawing must be done.”

³ No exceptions were filed to this finding.

⁴ *Stewart Granite Enterprises*, 255 NLRB 569, 573 (1981); *Boston-Needham Industrial Cleaning Co.*, 216 NLRB 26, 28 (1975), *enfd.* 526 F.2d 74 (1st Cir. 1975).

spondent are a “small, functionally discrete group . . . who had never interacted with the other General unit employees.” Thus, unlike in *Nova*, there was no “inappropriate ‘fragmentation’ of a previously homogeneous grouping of employees.”⁹

The instant case is also distinguishable from *Atlantic Technical Services Corp.*,¹⁰ a factually unique case in which the Board found that successorship had not been established.¹¹ In *Atlantic Technical*, supra, the alleged successor took over a tiny portion of what had previously been a Trans World Airlines companywide unit of mechanics and related classifications covering approximately 14,000 employees. Approximately 1100 mechanics and machinists were employed by the predecessor, TWA, at the Kennedy Space Center. There were also approximately 41 TWA employees at the Kennedy Space Center doing mail sorting and distribution, who had been originally brought into the larger unit as a voluntarily recognized “accretion” to the overall unit. The alleged successor took over only the mail sorting and distribution functions, and hired approximately 27 of the employees formerly employed by TWA. Apart from the large numerical differences between the original mechanics unit and the alleged successor unit of mail handlers, the Board, in finding no successorship relationship, emphasized the fact that there had been no showing of majority sentiment for the union by the employees in the accreted mail handlers unit. By contrast, here there is no issue of accretion at all. The Board in *Atlantic Technical* also relied, inter alia, on the fact that TWA was a large company engaged primarily in transportation and related fields,

was regulated by the Railway Labor Act, and had contracts throughout the country. By contrast, the alleged successor was a small organization, recently organized to perform small technical support service contracts. The Board noted the substantial difference between the employer-employee relationship in a large corporation and the employer-employee relationship in a small operation. Unlike in *Atlantic Technical*, we find that the diminution of unit scope under the circumstances presented here is insufficient to meaningfully affect the way the employees view their job situations, and would not significantly affect employee attitudes concerning union representation.

For these reasons, we conclude that there exists the requisite substantial continuity in the employing enterprise and that successorship has not been defeated by the fact that the Respondent took over only the HVAC portion of General Growth’s operations. Thus, if the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation, then the Respondent must be found to be a successor to General Growth.¹² Here, the unit is unquestionably appropriate.¹³ In addition, because all of the employees in the Respondent’s HVAC unit were formerly employed by General Growth, we find continuity in the work force. Accordingly, we conclude that the Respondent is a successor employer with the attendant obligation to recognize and bargain with the Union on request.

The Court in *Fall River* approved of the Board’s “continuing demand” rule that provides that a union’s premature demand for bargaining, although rejected by the employer, continues in effect until the successor acquires a “substantial and representative complement” of employees.¹⁴

On December 27, 1995, the Union made a proper demand for bargaining to the Respondent. The Respondent declined to bargain with the Union, stating in effect that the request was premature.

We find that the Union’s December 27 demand, although not repeated after that date, operated as a continuing demand to represent and bargain collectively with the Respondent for the unit employees. When the Respondent hired the four HVAC employees on December 28, it acquired a substantial and representative complement of employees. Therefore, we find that the Respondent’s refusal to recognize and bargain with the Union on and after December 28, 1995, violated Section 8(a)(5) and (1) of the Act.

⁹ *Stewart Granite Enterprises*, supra at 573. In *Nova*, the General Counsel contended that the new employer was a successor with respect to its operations at the bank locations. However, as stated in fn. 6, supra, the facts showed that the new employer acquired only some of the predecessor’s janitorial work for the bank. Thus, the predecessor employees hired by the new employer represented an arbitrary segment of the group of employees who previously performed such work. By contrast, in the instant case, the Respondent hired all the employees of the predecessor performing HVAC work at the Smith Haven Mall, and their separation from the housekeeping employees is appropriate given that the two groups of employees performed distinct functions and there was no interchange.

We disagree with our dissenting colleague’s premise and conclusion that “if there is no successorship in a case where a homogeneous unit remains homogeneous, a fortiori there is no successorship when a multi-classification unit is fragmented into a one-classification unit.” See *Hydrolines*, supra, 305 NLRB at 422. (“The Board . . . has found successorship even though the alleged successor took over a part of the predecessor’s operations, and thereby divided a bargaining unit that had consisted of a very homogeneous group of employees.”) Thus, as set forth above, we find that the predecessor’s unit here was not inappropriately fragmented, but was divided along an obvious line of separation, resulting in a new appropriate unit of HVAC employees with common duties and interests.

¹⁰ 202 NLRB 169 (1973), enf’d. 498 F.2d 680 (D.C. Cir. 1974).

¹¹ Chairman Gould believes that *Atlantic Technical*, supra, was incorrectly decided and would overrule that case.

¹² *Stewart Granite Enterprises*, supra.

¹³ No exceptions were filed to the judge’s finding that the HVAC unit would be appropriate.

¹⁴ 482 U.S. at 52.

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:¹⁵

All central plant technicians employed by the Respondent at the Smith Haven Mall, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

4. The Respondent is a successor employer to General Growth Management, Inc.

5. The Respondent has refused, since December 28, 1995, to recognize and bargain with the Union as the exclusive collective-bargaining representative for its unit employees.

6. By the acts and conduct described above, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, and those unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, we shall order it to cease and desist and take certain affirmative action necessary to effectuate the policies of the Act. We shall order that the Respondent recognize and, on request, bargain with the Union as the collective-bargaining representative of the unit employees and, if an understanding is reached, embody that understanding in a signed agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Simon DeBartelo Group a/w M.S. Management Associates, Inc., Lake Grove, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively in good faith with Local 32B-32J, Service Employees International Union, AFL-CIO as the exclusive collective-bargaining representative for the unit employees in the following appropriate unit:

All central plant technicians employed by the Respondent at the Smith Haven Mall, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

¹⁵ The unit description appears as amended at the hearing.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

(b) Within 14 days after service by the Region, post at its facility in Lake Grove, New York, copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 28, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting.

Contrary to my colleagues, I agree with the judge that the Respondent is not a *Burns*¹ successor to General Growth Management, Inc. (General). Accordingly I find that the Respondent did not violate Section 8(a)(5) and (1) by refusing to recognize the Union as the exclusive representative of the Respondent's four heating and air-conditioning (HVAC) mechanics.

Under the "successorship" doctrine, an employer that takes over the operations and employees of a predecessor employer is required to recognize and bargain with the union representing the predecessor's employees only where: (1) there is a substantial continuity between the predecessor's and the employer's operations; and (2) a majority of the new employers' employees,

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972).

in an appropriate unit, consist of the predecessor's employees. *Burns*, supra; *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). In determining whether successorship has been established, the key inquiry is whether, as a result of the transitional changes between the predecessor and new employer, it reasonably may be presumed that the employees of the new employer desire union representation. See, e.g., *Mondovi Foods*, 235 NLRB 1080, 1082 (1978). Under this analysis, I agree with the judge that the Respondent is not a *Burns* successor.²

The judge found that the four HVAC employees, whom the Respondent hired, constitute an appropriate unit.³ However, he concluded that the Respondent was not General's successor because he found no "substantial continuity of the employing enterprise." In this regard, the judge found that the HVAC employees had been in a unit consisting of approximately 40 housekeeping and maintenance workers previously employed by General to clean and maintain the Smith Haven Mall. These employees were covered by a collective-bargaining agreement between General and the Union. When the Respondent purchased the mall, it terminated the contract with General, contracted out the vast majority of the housekeeping and maintenance work to another contractor, and hired its own HVAC work force. Although the HVAC employees it hired were the four who previously worked for General, the judge noted that they had been only a small portion of the General unit, they were only one of several categories of employees who had been in that unit, and they performed none of that unit's general maintenance or housekeeping work. Relying on *Nova Services Co.*, 213 NLRB 95, 97 (1974), the judge found that the size of the new employer's unit (relative to that of the predecessor's unit) was an important factor in assessing successorship status. Based on the substantial diminution of the General-Union unit—i.e., the new employer's unit was only about 10 percent of General's maintenance and housekeeping unit—the judge concluded that successorship had not been established.

I agree with the judge. Further, in finding that the Respondent is not a *Burns* successor, I also rely on the fact that, under the Respondent, there has been a significant structural change from the General unit. Thus, the various categories of maintenance and housekeeping employees have been eliminated through subcontracting, and the only portion that remains under the Respondent's employ is the small, functionally dis-

crete group of HVAC employees who had never interacted with the other General unit employees.

My position finds ample support in *Nova Services*, supra, and *Atlantic Technical Services Corp.*, 202 NLRB 169 (1973), enfd. 498 F.2d 580 (D.C. Cir. 1974). Here, as in *Nova*, the new employer hired only a few predecessor employees to perform work which constituted only a small portion of the work that the predecessor had performed. As in *Nova*, this is "too fragmentary a basis upon which to predicate a finding of legal successorship." 213 NLRB at 97.

Similarly, as in *Atlantic Technical*, the Respondent took over only a small segment of the predecessor unit, and that segment was functionally distinct from other classifications in the predecessor unit. Under these facts, as in *Atlantic Technical*, the "size and organizational structure of the employer succeeding to the smaller unit [was] in a number of respects materially different," and this difference was a "sufficiently substantial change in the employing industry to defeat any finding of successorship." 202 NLRB at 170.

My colleagues seek to distinguish *Nova* on the basis that the predecessor in that case performed only janitorial work, and the new employer took over some of that work. By contrast, say my colleagues, the predecessor in the instant case performed *HVAC and other work*, and the new employer took over only the HVAC work. In my view, this difference makes the instant case an even weaker one for successorship than *Nova*. In the prior case, the unit was "all janitorial" under both the old and new employer. In the instant case, the unit has undergone a substantial transformation. The prior unit was mostly a housekeeping and maintenance unit; the new unit is solely an HVAC unit.

My colleagues also seek to distinguish *Atlantic Technical* on the basis that the mail sorting and distribution employees in that case were originally accreted into the predecessor's unit. In my colleagues' view, this was a primary reason for the conclusion that the new employer (who took over the mail sorting and distribution operation) was not a successor. However, I think it clear that the Board's overall emphasis is not on how the employees originally came to be in the predecessor's unit, but rather on whether there has been a significant change from the predecessor unit to the new employer's unit.

The majority also argues that *Mondovi*, supra, supports its position because there—when resolving the successorship issue—the Board considered such factors as whether there had been a hiatus in operations between the predecessor and the new employer and whether there had been changes in the product, market, and location of production. Applying those factors to this case, my colleagues argue that successorship must be found. I disagree. Certainly, the factors cited in *Mondovi* are among the many considerations relevant

²As my colleagues correctly note, courts have recognized that successorship is "a field where intricate line drawing must be done." *NLRB v. Boston-Needham Industrial Cleaning Co.*, 526 F.2d 74, 77 (1st Cir. 1975). The majority and I fundamentally disagree on where, under extant law, the line must be drawn in this case.

³As no exceptions were filed to this finding, I need not pass on it.

to the successorship issue. They are, however, neither exhaustive nor determinative. Rather, in this highly fact-intensive area of the law, all relevant facts must be considered in determining whether it reasonably may be presumed that employees of the new employer desire representation. Based on all relevant factors, I find that successorship was not established.

The majority also cites *Mondovi* for the proposition that “a change in scale of operation” will ordinarily not preclude a finding of successorship. In response, I note that the instant case does not involve a mere “change in scale of operations.” Rather, the character of the unit was changed. That is, the unit did not simply change from a large housekeeping and maintenance unit to a smaller one. Rather, the unit changed from a housekeeping and maintenance unit to an HVAC unit. Phrased differently, the unit has not simply grown smaller; it has fragmented.⁴

In light of the fact that the HVAC employees are in an entirely different unit, and are now employed by an entirely different employer, I think that there is at least a question as to whether these employees continue to desire union representation. I would allow the employees to answer that question for themselves, rather than guess or presume that they want union representation.

Accordingly, for all of these reasons, I find that the Respondent was not a successor to General, and I would dismiss the complaint.

⁴As noted, *supra*, in *Nova*, the predecessor’s unit consisted of a homogeneous unit of employees (janitors) and the new employer’s unit consisted of a smaller homogeneous unit of janitors. The Board held that the new employer was not a successor. In the instant case, the predecessor’s unit consisted of housekeeping, maintenance, and HVAC employees, and the new employer’s unit consists of only HVAC employees. In my view, if there is no successorship in a case where a homogeneous unit remains homogeneous, a fortiori there is no successorship when a multiclassification unit is fragmented into a one-classification unit. *Hydrolines*, 305 NLRB 416 (1991), is distinguishable from *Nova* and the instant case. As the Board noted in *Hydrolines* (fn. 43), *Nova* involved the respondent’s takeover of only a “very small part of the predecessor’s unit.” That is true of *Nova* and the instant case, and is unlike *Hydrolines*. Similarly, *Stewart Granite Enterprises*, 255 NLRB 569, 573 (1981), is distinguishable from *Nova* and the instant case. As the Board there noted, distinguishing *Nova*, the new employer took over the plant employees, while the geographically separate quarry employees remained with the predecessor.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain collectively in good faith with Local 32B–32J, Service Employees International Union, AFL–CIO as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All central plant technicians employed by us at the Smith Haven Mall, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

SIMON DEBARTELO GROUP A/W M.S.
MANAGEMENT ASSOCIATES, INC.

James P. Kearns, Esq., for the General Counsel.

Douglas Heckler, Esq., for the Respondent.

Ira Sturm, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on August 19, 1996, in Brooklyn, New York.

On May 23, 1996, a complaint issued in the above captioned case. This complaint was based on a charge filed by Local 32B–32J Service Employees International Union, AFL–CIO (the Union) against the Simon DeBartelo Group a/w M.S. Management Associates, Inc. (Respondent). The thrust of the complaint is that Respondent, an alleged successor employer, has failed and refused to recognize and bargain with the Union in an appropriate unit with whom the predecessor employer had a collective-bargaining agreement.

Respondent is a Delaware corporation with a place of business located in the Smith Haven Mall located in Lake Grove, New York. Respondent is engaged in the ownership and management of this mall. During the year 1996, in the course and conduct of its business operations, Respondent derived gross annual rentals from stores located in the mall in excess of \$100,000, of which \$25,000 was derived from Federated Stores Inc. During the year 1996, Federated, in the course and conduct of its business, purchased and received at its Lake Grove location goods valued at in excess of \$50,000 directly derived from enterprises located outside the State of New York.

It is admitted and I conclude that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Prior to December 1995, the Smith Haven Mall was owned by Prudential Inc. The mall was managed by General

Growth Management Inc. (General). General had a contract with the Union covering a unit consisting essentially of housekeeping employees. These housekeeping employees numbered about 35 employees employed in such classifications as housekeepers, machine operators, who operated sweeping and floor washing machines, and other building maintenance employees. In addition, there were four A mechanics, employees who operated the heating and air-conditioning machinery for the mall, herein called HVAC employees, to distinguish them from other mechanics who performed housekeeping type duties. There was no interchange between the housekeeping employees and the HVAC maintenance employees.

In December 28, 1995, Simon bought the mall from Prudential and terminated General as the cleaning contractor. On the morning of December 28, General held a meeting of all unit employees, and informed them of the sale. Sometime later that same day, Respondent representatives met with the unit employees and told them that they were contracting out the housekeeping and maintenance services to an outside cleaning contractor, but that they intended to handle the HVAC work on an in-house basis, with their own employees. Simon invited those employees interested to submit an application. Still later on December 28, the four HVAC employees formerly employed by General and a number of outside applicants applied for the in-house HVAC jobs. Respondent hired the former General HVAC employees. No other applicants were hired. Thus on December 28, an outside cleaning contractor had been contracted to perform the cleaning and maintenance service for the mall. There is no evidence that this outside contractor hired any of the 35 housekeeping and maintenance employees formerly employed by General. The four HVAC employees formerly employed by General were now employed by Respondent to perform the same work they performed for General, that is to maintain and run the heating and air-conditioning equipment for the mall.

On December 27, the Union, apparently aware of the pending sale sent a letter to Respondent demanding recognition for the contractual unit covered by their collective-bargaining agreement with General, namely, the housekeeping employees, general maintenance employees, and the HVAC employees. Respondent's attorney responded by mail and informed the Union that its demand was premature. At no time subsequent to the sale and present operation of the mall has the Union demanded recognition for what has essentially become an HVAC unit.

The four HVAC employees perform essentially the same work they performed for General. The HVAC equipment is the same and the job of these unit employees is to operate this equipment. Joseph Mancuso, one of the HVAC employees credibly testified, without contradiction, that his duties were essentially the same as those he and the other three HVAC employees performed for General. Mancuso admitted his job title changed from "Maintenance A" to central plant technician, and that HVAC employees now order replacement parts, whereas when employed by General such parts were ordered by a General supervisor. Other changes include that sprinkler shut downs connected with the fire system used to be handled by the maintenance employees and are now handled by the HVAC employees. Also the HVAC employees are now more involved in responding to calls from mall tenants. I consider these so called added responsibilities

rather inconsequential. In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987), the Court held that whether the employees are performing the same duties for the alleged successor as they performed for the predecessor, an important consideration is how these employees view their present job duties. As set forth above, Mancuso, the only witness to testify on this issue viewed his job duties and responsibilities to be essentially the same for both employers. Accordingly, I find as a fact that the HVAC employees performed essentially the same duties and job functions for Respondent as they did for General.

Analysis and conclusions

It is well settled law that a mere change in ownership of the employing entity is not such an "unusual circumstance" as to relieve the new employer from an obligation to bargain with the labor organization representing the predecessor's employees. *Burns International Detective Agency v. NLRB*, 182 NLRB 348 (1970), *enfd.* in part 441 F.2d 911 (2d Cir. 1971), *affd.* 406 U.S. 272 (1972). In *Fall River*, *supra*, *id.* 43 the Court held that in determining whether a successorship exists, the focus is on whether there is a "substantial continuity" between the enterprises. Under this approach, the Board examines a number of factors: Whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions, under the same supervisors; and whether the new enterprise has the same production process, produces the same products, or performs the same services, and basically has the same body of customers. This approach is primarily factual in nature, and is based upon the totality of the circumstances in a given case.

Applying such analysis to the facts of the instant case it is clear that the business is essentially the same. Respondent provides, through a subcontractor, the housekeeping services, formerly provided by the predecessor, and the HVAC services performed by its employees, who were formerly employed by the predecessor. The same equipment is used in providing these services, and the customers are the same, namely the stores comprising the mall.¹ The supervisory staff of Respondent is not the same as that of the predecessor.

The major issue in this case is whether there has been such a substantial change in the bargaining unit, so there is no longer a "substantial continuity" and, therefore, no successorship relationship that would require Respondent to recognize the Union as the collective-bargaining representative for those four HVAC employees formerly employed by the predecessor employer. The bargaining unit covered by the Union's collective-bargaining agreement was essentially a housekeeping and maintenance unit. The entire bargaining unit consisted of approximately 40 employees. Approximately 35 of these employees were housekeeping or maintenance employees. These employees were not hired by Respondent. Respondent instead subcontracted the housekeeping and maintenance work formerly performed by unit employees to a subcontractor who employs its own employees who are apparently represented by another labor or-

¹ In Respondent's mall Macy and two other large stores perform their own housekeeping, maintenance and HVAC services. Such services to all other stores in the mall are provided by Respondent, and its cleaning subcontractor.

ganization. Thus Respondent has continued in its employ, only a small fraction of the prior bargaining unit, who perform no housekeeping or maintenance work formerly performed by the bargaining unit. The work performed by these four residual unit employees is the same HVAC work they performed when employed by the predecessor employer.

The General Counsel contends that a successorship obligation continues despite an employer hiring only a portion of an appropriate unit, so long as the new unit constitutes a separate appropriate unit. The residual unit of maintenance or HVAC employees do not possess craft status. Their duties consist of operating the controls which regulate the required heat or air conditioning in the various stores comprising the mall. Additionally they maintain this equipment which requires certain electrical and mechanical skill. There is no interchange between the HVAC employees working the heating and air-conditioning machinery and the other unit employees. The Board has found such unit would be an appropriate unit even though other production and maintenance employees employed by the same employer were represented by another labor organization. Accordingly, I would conclude that a unit of Respondent's maintenance or HVAC employees would constitute an appropriate unit. *G. Heileman Brewing Co.*, 290 NLRB 991, 1000 (1988).

In order to establish successorship, the General Counsel must establish the "continued appropriateness of the bargaining unit." *Burns*, supra. In this case the predecessor unit was essentially a cleaning and housekeeping unit, numbering approximately 40 employees in a number of job classifications. Thirty-five of these employees were cleaning and maintenance employees whose job duties were to keep the mall clean and maintained. Only four unit employees, under a single job classification, were employed solely to operate and maintain the heating and air-conditioning units at the mall. When Respondent took over the operation of the mall, it subcontracted out the whole cleaning and maintenance operation to an outside contractor who employed its own employees. There is no evidence in this record that any cleaning or maintenance employees were employed by Respondent. The Board has held that a successorship obligation continues when the successor employer hires only a portion of the predecessor's unit classifications, provided the remainder or residual unit constitutes a separate appropriate unit. *Stewart*

Granite Enterprises, 255 NLRB 569, 573 (1981). However, the size of this residual appropriate unit when compared with the size of the overall unit covered by the predecessor's collective-bargaining unit would appear to be an important consideration as well. Suppose the overall size of the unit in this case were 100 unit employees, only 2 of whom maintained and operated the heating and air-conditioning equipment, would an appropriate unit comprising 2 employees in a single unit classification be considered as such a unit which would establish the "continued appropriateness of the bargaining unit." The Board considered this issue in *Nova Services Co.*, 213 NLRB 95, 97 (1974), and again in *Hydrolines, Inc.*, 305 NLRB 416, 423 and fn. 43 (1991). In *Nova*, the predecessor was a statewide cleaning operation which had a contract with a particular bank. The alleged successor solicited a janitorial contract for part of the banks facilities. An outside contractor, as in the instant case, handled a significant portion the unit work in the bank. The predecessor employed a total of 300 employees statewide, but used only 10 to 12 employees to take over its portion of the unit work at the bank. The alleged successor employed a total of 36 employees and used 10 of these employees at the banks facilities, 8 of whom were union employees. The Board concluded that in these circumstances that there had not been "substantial continuity of the employing enterprise," given the small residual size of the appropriate unit left over when compared to the size of the unit represented by the predecessor, I make the same conclusion.

Accordingly, I conclude that the General Counsel has failed to establish a "substantial continuity of the employing enterprise." I, therefore, conclude that Respondent was not a successor employer.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not violated Section 8(a)(1) and (5) of the Act, as alleged.

[Recommended Order for dismissal omitted from publication.]